IN THE

Supreme Court of the United States

October Term, 1959

No. 717

WILLIAM H. CALEY, individually and as assignee, owner and on behalf of the owners of 17,396 shares of the common stock of Superior Sugar Refining Company,
Respondent,

AGAINST

ALBERT FLEGENHEIMER,
Petitioner.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin

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This brief is submitted in reply to respondent's brief offered in opposition to petitioner's petition for a writ of certiorari to the Supreme Court of the State of Wisconsin.

The Petition to This Court Properly Raises the Federal Questions Presented to the Supreme Court of Wisconsin

The petition herein properly exhibits the manner in which the federal questions involved were first raised. It was in the opinion of the Supreme Court of Wisconsin that the indefiniteness of the capacity of the party plain-

tiff in the action was first proclaimed. The notice of motion assigned the arguments relating to breaches of defendant's rights guaranteed to him by the 14th Amendment of the United States Constitution. The applicable provision of the Federal Constitution was announced by name to the said Supreme Court.

The attention of this Court has been cited to such motion where the federal references appear at the very outset thereof. The problem is neither enmeshed in other matters so as to become obscure nor presented as a minor matter of passing remark.

In his argument on the petition, and in the petition itself, petitioner has shown that the federal questions could not have been presented at an earlier time than the rehearing motion since the due process violations were unequivocably concluded by the opinion of the said Supreme Court.

The Matter at Bar Extends Beyond the Problem of Whether Respondent Was the Real Party in Interest to the Action

At page 4 of respondent's brief in opposition to this petition, it is claimed that by the bill of particulars petitioner should have been aware that Caley did not attempt to act for a class. However, such averment is as confusing as Caley's entire presentation below, especially since in his bill of particulars he alleged (Append., p. 131):

> "d) The present action is brought by the plaintiff as a member of a class of petitioners united with him in interest. * * * "

Caley's position as party plaintiff was in several mutually antagonistic capacities. As maintained in the argu-

ment on this petition, each position bore its own set of particular rules and results. An attempt by petitioner in the courts below to resolve the ambiguity was struck down at a motion term. Such nebula was preserved to the trial by the motion court's order recognizing objections to the complaint as defined by the bill of particulars (Resp. Brief, p. 11), while denying a motion to amend the pleadings in defense to the complaint (Resp. Brief, p. 13).

The appellate court, instead of piercing the haze, sidestepped the question, proclaimed that petitioner could not be heard to raise his objections, declared that respondent's capacity as party plaintiff was not clear and then elected to close the case.

The Constitutionality of Wisconsin Statutes, Section 263.12 Did Not Arise Until the Opinion of the Appellate Court Was Delivered

Respondent argues that the constitutional questions were not properly presented for consideration by the Wisconsin court.

It is submitted that Wisconsin Statutes, section 263.12 did not come into play until it appeared in the appellate opinion. Its provisions were not claimed by respondent as controlling in either the trial or appellate courts. Petitioner accordingly, made no comment thereon.

Concerning the uncertainty of the effect of the judgment, it is submitted that it was the opinion of the appellate court which obscured the same. It having commented upon the capacity of the plaintiff to maintain the action in his several and antagonistic positions the court did not pronounce whether judgment was recovered by a class representative, an assignee or a trustee of an

express trust authorized to sue without joinder of the beneficiaries thereof.

Assuming, *arguendo*, that the judgment of the trial court had been sure and certain (which it was not in the light of the pleadings which formed a part of the judgment roll), the opinion of the appellate court served to confound the identity of the party plaintiff to the effect that one could never clearly determine who, particularly, could ever claim the benefits of the judgment. Respondent's brief speaks of Schedule "A" persons and Schedule "B" persons and maintains that the Schedule "B" persons are not entitled to claim under the judgment. However, the trial court did not decide which individuals could claim the judgment (other than Caley) and the appellate court declared that it was not going to cure the ambiguity.

Accordingly, insofar as the appellate court held that section 263.12 applied to bar petitioner from questioning that which operated to make the judgment obscure, alternative and uncertain, that court abridged petitioner's constitutional rights.

The objections relating to "class" action go beyond the claim that respondent was not the real party in action. As explained in the argument in support of the petition herein, the determination of a class action, as such, is a matter of substance and not of mere naming of persons. There must be a determination that the cause of action is one which could be claimed by a class. It was argued that the action could not be a class action. The appellate court determined that such question could not be raised.

Thus did the appellate court apply the Wisconsin statute in an unconstitutional manner, since it declared that such statute operated to bar an objection which was jurisdictional in its nature.

The *Res Judicata* Effect of the Judgment Is Ambiguous and Confusing

In any action which may stem from the subject matter of the action below one can never determine the *res judicata* effect of the judgment herein. The judgment roll now contains the opinion of the appellate court which finds that several antagonistic capacities were involved in party plaintiff's position with each capacity being entitled to a different type of claim to the judgment. No future court could possibly determine the effect of the judgment without coming to a conclusion that one capacity existed to the exclusion of all others. The effect of such a holding would be to modify the appellate decision and substitute one holding for that which is supposed to bind the world.

Being faced with a judgment which is so uncertain can operate only to deprive petitioner of his property without the safeguards guaranteed to him by the Federal Constitution.

The Federal Questions Were Adequately and Timely Presented to the Appellate Court

The case of *Godchaux v. Estopinal*, 251 U. S. 159, 40 S. Ct. 116, cannot control in the case at bar since the federal question and abridgement of petitioner's constitutional rights were created by the declarations of the appellate court. Thus, such questions could not be raised by any device other than a motion for a rehearing. Upon the denial of the rehearing, the appellate court refused to entertain the questions and left to petitioner a stay in court in which he could review his constitutional rights.

Moreover, the case of *Bowe v. Scott*, 233 U. S. 658, 58 L. Ed. 1141, is wholly inapplicable to the facts of this

proceeding. Probably due to oversight, respondent's counsel failed to observe that in the motion for rehearing petitioner claimed that the decision of the appellate court violated his rights guaranteed under the due process provisions of the 14th Amendment of the Federal Constitution.

Petitioner referred expressly to the Constitution of the United States in his motion for rehearing and properly raised the federal questions presented in his present petition to this Court.

It is respectfully submitted, therefore, that the petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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Of Counsel:

ARNOLD DAVIS, ESQ.